IN THE

Supreme Court of the United States.

No. 427.

OCTOBER TERM, 1950.

ELIZABETH HEALY, ADMINISTRATRIX OF THE ESTATE OF JOHN E. HEALY, DECEASED,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals for the Third Circuit (R. 189) is reported in 184 F. 2d 209.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. A., Section 1254).

QUESTION PRESENTED.

Whether the Court of Appeals erred in directing the entry of judgment for respondent on the ground that on the facts petitioner had failed to show any negligence on the part of the respondent that contributed to the death of the decedent.

STATUTE INVOLVED.

Section 1 of the Federal Employers' Liability Act (Act of April 22, 1908, Chapter 149, as amended by the Act of August 11, 1939; 45 U. S. C. A., Section 51) provides:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

STATEMENT.

The body of petitioner's decedent, John E. Healy, was discovered, having been fatally injured, on December 4, 1944 beside respondent's main line tracks at Cresson, Pennsylvania. The facts concerning the accident are not in dispute and were all shown by petitioner's witnesses as a part of petitioner's case, and established merely the death of the decedent, without any evidence of the cause of death or that respondent could or should have done anything to prevent it.

The deceased was a 44-year-old track laborer whose regular place of work was 8 miles from the place of the accident (R. 47a). Several days before the accident the deceased was informed that a United States war bond rally would be held on the morning of December 4, 1944 at the Hall of the Loyal Order of Moose in the town of Cresson (R. 41a). Attendance at the bond rally was not compulsory and the employees could go or not, as they chose, but those who did attend were paid for their time (R. 61a).

When the deceased left home on the morning of the accident he told his wife that he was going to the bond rally with the rest of the men and that he was also going to the supervisor's office to see what had become of "that one bond he should have received before and didn't re-

ceive'' (R. 10a, 11a). No basis for his reported belief that a bond was overdue was shown or existed. When he left home he was wearing a tan top coat and a hunting cap, which was brown and tan with blue stripes (R. 12a).

When the truck, which brought the decedent and others from Gallitzin, arrived in front of the Moose Hall in Cresson, all the other men, including one who was 70 years old (R. 65a), got off the truck unassisted, but the deceased remained in it (R. 53a). He told the older man, DeHaven, that he did not feel well that morning, and asked to be helped off the truck (R. 53a, 64a, 65a). DeHaven helped the deceased get off the truck and walked with him from the curb to the door of the Moose Hall (R. 54a).

This was the last time and place any witness saw Healy alive. His body was subsequently found more than three blocks away, beside one of the respondent's tracks near its Cresson station. There is a complete ''hiatus'' in the evidence (R. 139a) between these two unrelated facts.

The respondent's station in the town of Cresson was three blocks north and west of the Moose Hall (R. 151a, Plaintiff's Exhibit 1). Cresson is on the respondent's main line from New York to Chicago and the tracks there are elevated 15 feet above street level (R. 59a). The station building was on the south side of the tracks, and the supervisor's office was on the north side of the tracks and 500 feet east of the station (R. 60a, Plaintiff's Exhibit 1). To permit safe passage from one side of the tracks to the other, the respondent had constructed a pedestrian underpass or tunnel under all the tracks, from which covered stairways led up to the waiting platforms and to the north side of the tracks (R. 59a, 60a, Plaintiff's Exhibit 1). Other than by the safe route provided by the respondent through the underpass, there was no way to get to the track level except by climbing up over a 15 foot bank between the street and the tracks (R. 59a). At the track level there was a wooden baggage crossing which connected the station building on the south side of the tracks with the platforms

between the tracks and on the north side. The platforms were about 400 feet long and the baggage crossing was in the center and thus about 200 feet from either end (Plaintiff's Exhibit 1).

At about 8:20 A. M., a long freight train, in which there were about 70 cars (R. 76a), was moving eastwardly toward Cresson station at about 5 miles per hour (R. 13a, 14a, 15a, Plaintiff's Exhibit D-1). The engineer on the leading engine of this train was, at the time of the trial, in a hospital, and the petitioner offered in evidence two signed statements made by him and also offered portions of his deposition, which had been previously taken by the petitioner. The two statements were produced by the respondent in response to petitioner's subpoena and were marked, respectively, D-1 and D-2. The petitioner then offered the two statements in evidence as part of her case (R. 36a, 37a), and suggested that they be renumbered as petitioner's exhibits. Because the statements had been referred to previously (R. 32a), the trial judge preferred not to change the numbers (R. 36a).

The engineer said (R. 154a, Plaintiff's Exhibit D-2) that it was daylight at the time, the weather was cold and hazy, and there was snow on the ground. He had shut off the power and was applying the independent brake because the next block signal was set against him (R. 14a, Plaintiff's Exhibit D-2), indicating that another train was preceding him by a short distance on the same track.

He was leaning out of the window on his side of the cab and looking ahead (Plaintiff's Exhibit D-2). The engine was equipped with an automatic bell, which was started ringing before the engine reached the west end of the station, which rang constantly as the engine approached and passed the station, and which continued to ring even after the engine came to a stop (R. 23a, 24a, 26a, 33a, 34a, 35a). Although it was after 8 o'clock in the morning, the engine headlight was on "dim", which "gives definite light that any person can see", and the headlight was not obstructed by ice or otherwise (R. 21a, 22a).

As he approached Cresson station, the engineer saw a man, dressed in an overcoat of a yellowish cast, who crossed the tracks at the baggage crossing (R. 15a, 16a, 23a). This man crossed from south to north and "had plenty of time", and the engineer testified that "from where he was and the position I was in, I could get a full view of the station, and he got clean over onto the station platform", which was on the north side of the tracks (R. 15a, 16a, 20a). It was the petitioner herself who offered this uncontradicted testimony, that the person referred to got *completely across the tracks in safety,* and the petitioner also offered the uncontradicted statement that the person referred to *was not the deceased* (Plaintiff's Exhibit D-2, R. 155a). The engineer never saw the deceased until after the accident (Plaintiff's Exhibit D-2, R. 154a).

Like all the other witnesses in the case, the fireman on the same engine was a witness for the petitioner. He testified that his first duty was taking care of the fire and the steam (R. 81a), but when the engine reached the western end of the station platform, he looked ahead and observed the full length of the platform to its eastern end, which was 400 feet away (R. 83a, 84a, Plaintiff's Exhibit 1). When the engine came nearly to the eastern end of the platform, the fireman leaned out of the cab window (R. 70a) to check the block signal, which was about 1600 feet ahead of the station platform (R. 80a). He had to lean out of the cab in order to see the block signal because the track curved slightly to the right (R. 75a). As he did so, he thought he saw a bag of rags rolling on the ground beside the engine opposite its second or third driving wheel (R. 70a). He looked again and saw that it "was a shirt or a man's shirt or bag. It looked like a man then, rolling in the 6 foot—that is, on the outside of the rail" (R. 70a). The "6 foot" was the space between the platform and the rail nearest to it, and the body was about 15 feet west of the east end of the platform (R. 70a, Plaintiff's Exhibit D-2) and was therefore about 185 feet east of the wooden

baggage crossing (Plaintiff's Exhibit 1). The fireman called to the engineer to stop the train, the engineer immediately applied the brake, and when the train stopped, the body was still outside of the rails and was beside the third car from the engine (R. 74a, 77a).

There was no evidence as to how long the body of the deceased had been where it was first seen, and no evidence as to how it got there. The block signal was set against the train beside which the deceased was first seen, indicating that another train was preceding it. The engineer saw the man in the yellowish overcoat as he was crossing the track at the baggage crossing and saw also that he had gotten completely across the track. The engineer later saw the body of the deceased lying on the ground 185 feet beyond the crossing. The engineer's uncontradicted testimony was that the man in the yellowish overcoat and the deceased were two different persons (Plaintiff's Exhibit D-2). Although there was snow on the ground (R. 155a), there was no evidence that the body of the deceased had been dragged. There was no evidence that the deceased had come in contact either with the front of the engine or with any part of the engine forward of a point 10 or 15 feet back from the front end. There was no evidence that the body of the deceased was in contact with any part of the engine or train during the interval between the time the engineer was told to stop the train and the time when the stop was effected. The body remained in the same place, outside of the rail, that it was when the fireman told the engineer to stop the train (R. 77a). There was no evidence that the deceased was ever under any wheel of the engine, and when the fireman was specifically asked, he stated that the body was beside the wheel of the engine (R. 74a). A brakeman who was on the engine and went back to pick up the body (R. 21a), was not called as a witness nor did the petitioner offer any evidence whatever to indicate the nature of the injuries suffered by the deceased, or the actual cause of his death.

At the conclusion of the petitioner's case, the respondent moved for a directed verdict (R. 132a) on the grounds that there was no evidence of the cause of the death of the deceased, no evidence of any negligence on the part of the respondent, no evidence that any negligence on the part of the respondent was the proximate cause of the death of the deceased, and no evidence that the deceased was acting in the course and scope of his employment at the time of his death. The respondent's motion was denied (R. 132a) and the trial judge charged the jury that if the deceased was on his way to the office of the supervisor in connection with a United States war bond, he was, as a matter of law, acting within the scope of his employment (R. 138a). Exception was taken to this portion of the charge (R. 148a) and to the refusal of the trial judge to affirm the respondent's points for charge relating to the burden of proof as to the proximate cause of the death. The jury returned a verdict for the petitioner in the amount of $15,170.60. Respondent's motion for judgment in accordance with its motion for a directed verdict was denied by the trial judge. The Court of Appeals reversed the judgment of the trial court for lack of proof "of any negligence on the part of the defendant company which contributed to the accident" (R. 193a).

ARGUMENT.

The petition shows on its face that the question presented does not meet the requirements the Court has laid down for granting of the writ of certiorari. *Supreme Court Rule 38* (*5*). The case involves no general principle that requires or deserves review by this Court; the ultimate question relates merely to the application of accepted principles to the particular facts here involved.

In any event, the decision below was correct. The petitioner's proof was insufficient to justify submission to the jury of the issue of respondent's negligence. And even if negligence should be assumed there was no evidence to sustain a finding by the jury that any act or omission of the respondent contributed to the death of the deceased.

I. This Case Presents No Question That Requires or Deserves Review by This Court.

The only question presented in this case is whether the Court of Appeals correctly held on the facts that the plaintiff had failed to make any showing that negligence on the part of the defendant Company had contributed to the death of the deceased. The decision of this question turns on the particular facts involved. No general principle is in controversy; the disputed issue relates merely to the application of well settled rules to the circumstances of this particular case. The decisions of this Court under the Employers' Liability Act disclose a consistent pattern of principle, which is not disputed in this case. In cases in which there is conflicting probative evidence, or in which conflicting reasonable inferences may be drawn from probative evidence, this Court has held that the conflicts must be resolved by a jury. On the other hand, if there is no conflict in the evidence and no probative evidence from which inferences favorable to the plaintiff can be drawn, this Court has either denied certiorari or affirmed the decision below. *Roberts v. Alabama Great Southern Railroad*

Co., 340 U. S. 829 (1950); *Emmick v. Baltimore & Ohio Railroad Co.*, 340 U. S. 831 (1950); *Roberts v. Missouri-Kansas-Texas Railroad Co.*, 340 U. S. 832 (1950); *Gentry v. Seaboard Air Line Railroad Co.*, 340 U. S. 853 (1950); and see the appendix to the concurring opinion of Mr. Justice Douglas in *Wilkerson v. McCarthy*, 336 U. S. 53, 68-73 (1949). The case at bar falls in the latter category. All of the evidence was offered by the petitioner. There is no conflict in the evidence that requires resolution by a jury and no basis in the evidence from which inferences favorable to the petitioner's case may reasonably be drawn. The evidence therefore did not meet the initial judicial test which is a basic and integral part of the jury trial system.

The decision of the Court of Appeals is not in conflict with the decision of another court of appeals on the same matter, nor did the Court of Appeals decide any important question of Federal law which has not been but should be settled by this Court. None of the other grounds stated in Rule 38 as the basis for granting a petition for a writ of certiorari is present. The petition should be denied.

II. The Evidence Was Insufficient to Warrant Submission to the Jury of the Issue of Respondent's Negligence.

All of petitioner's arguments are based upon two premises which are (1) essential to her case, (2) completely unsupported by any evidence, and (3) the reverse of the uncontradicted evidence she offered at the trial. These premises are, first, that the decedent was injured at a crossing where the respondent had a duty to anticipate his presence, and, second, that the engineer saw the decedent on the track but failed to warn him (Petitioner's brief pp. 3, 4, 10, 11, 12, 14). From the first of these two false premises the petitioner raises a similarly unsound corollary that the engineer and fireman both failed to observe the crossing as they approached it (Petitioner's brief pp. 4, 10, 11).

The petitioner's uncontroverted evidence, however, showed that Healy, when first seen lying beside the track, was not at the crossing but 185 feet away from it, where there was no crossing of any kind. An engine moving at 5 miles per hour could not throw a man 185 feet ahead of it, and although there was snow on the ground, there was no evidence that the body was dragged, or that it was ever in contact with the engine except at the moment the fireman first saw it. The engineer saw the man at the baggage crossing—who was not described as wearing a blue-striped hunting cap which Healy wore—and later he saw Healy 185 feet away from the crossing. The only evidence was that the engineer continuously observed the crossing and saw the first man get "clean over onto the station platform", that the man at the crossing and Healy were two different people, and that the engineer never saw Healy until his prone body was discovered beside the tracks on the opposite side of the slowly moving engine. Likewise, the petitioner's uncontroverted evidence was that the engineer was leaning out the window on his side of the engine, looking ahead; and the fireman, whose primary duty, as his title implies, was taking care of the fire, looked ahead and observed the full length of the platform when the engine was at its western end, and looked again before the engine reached the eastern end. It was this second time the fireman looked ahead that he noticed the body of the deceased on the ground beside the tracks.

The petitioner states repeatedly (Petitioner's brief pp. 3, 4, 12) that the approach of the train was "noiseless", yet her own uncontroverted evidence was that the train consisted of about 70 freight cars, at the head of which was a large over-the-road steam engine, whose automatic air-controlled bell began to ring before the engine reached the far western end of the platform, and continued to ring constantly until after the decedent's body was discovered and the engine stopped. Throughout that period during which the engine headlight was on and its bell constantly ringing,

the train was moving at 5 miles per hour, a rate of speed which many people can walk.

As the Court of Appeals pointed out (R. 193, 194), the petitioner simply failed to prove any negligence at all and certainly none which contributed in whole or in part to the accident because, on viewing the record in the light most favorable to the petitioner, there was no evidence from which an inference could be drawn that Healy was ever on the track—either at the crossing where the respondent might have anticipated him, or at the point where his body was found—or that Healy had ever been in a position of danger near the track and ahead of the engine at a time when he could have been seen and avoided, or that a blow from the engine caused his death. This is the basic difference between the petitioner's case and all the decisions of this Court upon which she relies, in each of which there was affirmative evidence pointing directly to an act of negligence as the cause of the accident or to a violation of the Safety Appliance Act which made proof of negligence unnecessary.

Thus in *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54 (1943) there was evidence that in the course of his work Tiller was checking car seals in a classification yard where the defendant knew, or should have known, that such work was regularly conducted. He "was standing between two tracks" at night "using a flashlight" when he was struck by the rear of a negligently unlighted train backing toward him. In *Bailey v. Central Vermont Ry.*, 319 U. S. 350 (1943) Bailey, in the course of his work, "walked out on the stringer on the bridge" which was "18 feet above the ground" and where "the only available footing was about 12 inches wide" and where "there was no guard rail". He was attempting to open the doors of a hopper car with a large wrench, which the defendant knew might jerk violently when Bailey accomplished what he was trying to do. In *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944) Tennant's "duties included staying near the rear or north

end of the engine as it made a backward movement", "the engine had remained stationary for several minutes, during which time the engineer saw Tennant disappear in the direction of the subsequent engine movement. Still not knowing the precise whereabouts of Tennant, the engineer then caused the engine and cars to make an extended backward movement" without ringing the engine bell. In *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600 (1945) in the course of his work and over his objection, Blair was "commanded" to move, by means of a small hand truck, three slippery steel tubes, each 30 feet long and weighing 1,000 pounds. When one of the tubes started to slip from the small truck, two fellow workers let go, which caused the truck to kick back and injure the plaintiff. In *Lavender v. Kurn*, 327 U. S. 645 (1946) there was "evidence that Haney's duties required him to wait at the switch north of the track". His body was found close to the switch where his duties required him to be and where his presence should, therefore, have been anticipated. "The curled end [of the mail hook] could thus be swung out to a point 3½ feet from the rail and about 73 inches above the top of the rail". There was undisputed medical testimony that the cause of death was a fracture of the skull by "some fast moving small round object" and evidence that the cause of death was a blow from a mail hook swinging out from the side of a train moving past a point where the decedent could reasonably have been anticipated.[1]

---

1. *Myers v. Reading Co.*, 331 U. S. 477 (1947) and *Coray v. Southern Pacific Ry.*, 335 U. S. 520 (1949), cited by petitioner, were both decided under the Safety Appliance Act, which did not require an independent determination of negligence because of the absolute duty imposed by that Act. In the *Myers* case a hand brake unexpectedly kicked back and threw the plaintiff to the ground and, in the *Coray* case, "the train unexpectedly stopped . . . because the air in its brake lines escaped, thereby locking the brakes . . . because of the violation of the Federal Safety Appliance Act . . .".

In each of the cases cited by petitioner there were *probative facts* from which both the negligence of the defendant and the causal connection between that negligence and the injury for which recovery was sought could reasonably be inferred. The irreconcilable difference between all those cases and the instant case is the complete absence here of probative facts which are necessary prerequisites of jury consideration.

Negligence cannot be determined in a vacuum. It is the lack of due care "under the circumstances". The Court of Appeals for the Third Circuit is an able court thoroughly familiar with the Employers' Liability Act and the decisions of this Court thereunder, and is aware of a widely held feeling that the Act is sociologically deficient, but as it said in a decision which was affirmed by this Court[2]: "But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case".

III. There Was No Evidence to Sustain a Finding That Any Negligence of the Respondent Caused or Contributed to the Injury.

In order to establish the right of recovery claimed under the Employers' Liability Act, the petitioner was required to prove not only that the defendant was negligent, but also that such negligence was the proximate cause, in whole or in part, of the injury for which suit was brought. *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54 (1943); *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944). "The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events": *Brady v. Southern Ry. Co.*, 320 U. S. 476, 484 (1943).

---

2. *Eckenrode v. Pennsylvania Railroad Co.*, 164 F. 2d 996, 1000 (C. C. A. 3rd, 1947) Aff'd, 335 U. S. 329 (1948).

The necessity of a proximate causal relationship between the negligence alleged and the injury, was recently illustrated in *Reynolds v. Atlantic Coast Line R. R. Co.*, 336 U. S. 207 (1949). Under the applicable state practice, the plaintiff there set forth all the facts proposed to be proved at the trial, and the defendant demurred on the ground that the facts set forth did not constitute a cause of action. The demurrer was sustained by the trial court, by the State Supreme Court and by this Court, which said at 336 U. S. 207, 208, 209:

> "The Alabama Supreme Court conceded that the complaint adequately charged negligence . . . It held, however, that the facts alleged did not show that the accident resulted proximately, in whole or in part, from that negligence. We cannot say that the Supreme Court of Alabama erred."

Although in his charge to the jury the trial judge inferred (R. 139a) that the engineer saw the deceased crossing the tracks at the baggage crossing, after which the trial judge said there was "an unfortunate hiatus" in the evidence, his inference was exactly the reverse of the petitioner's uncontradicted evidence that no witness saw the deceased alive except when he was over three blocks away complaining that he did not feel well. Although the trial judge referred to the body found beside the train as "a mangled body" (R. 138a) the record is completely devoid of evidence supporting such a statement. Neither the condition of the body nor the cause of death was shown. The simple and only fact proven was that the body of the deceased was on the ground outside of the tracks on the left side of a slowly moving eastbound engine. It is absolutely impossible to state or infer how long the body had been where it was found, whether in reaching that position the deceased had been walking or running or standing, or, if moving, whether he had been moving north, south, east or west. It is equally impossible to state or infer whether

Healy was alive or dead when the fireman first saw him and, since the body remained in the same place *outside the rail* while the train was being stopped, it is impossible to infer that the immediate "service" rather than "emergency" application of the brakes contributed in the slightest to the decedent's injury.

The impossibility of establishing the causal relationship between the respondent's alleged negligence and the death of the deceased in such circumstances was shown in *Trust Co. of Chicago v. Erie R. R. Co.*, 165 F. 2d 806, 809, 810 (C. C. A. 7th, 1948) *Cert. den.* 334 U. S. 845 (1948):

> "It is all speculation as to the manner in which the decedent met his death. That is the trouble with the plaintiff's case. One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable hypotheses as to how the accident happened may be conjured up, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn. . . .
>
> "A jury may not speculate and formulate a plausible theory as to where the accident happened and how it happened, and then speculate on what it was that the defendant did that was negligent and caused the accident. If there is some conflict in the evidence as to what the defendant did or did not do, which it should or should not have done, there may be a conflict for a jury to resolve, as was stated in Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916. In our case, there is no conflict in the evidence. There is a woeful lack of evidence, which would leave a jury to nothing but speculation. The Supreme Court has recently said that where the jury is left to speculation only, the trial court must step in and direct a ver-

dict. . . . The plaintiff argues that there was death by the defendant's train, therefore the defendant was negligent. That is arguing backward from effect to cause and not from cause to effect. The plaintiff must first prove the defendant's negligence which caused the injury. This it clearly failed to do."

If the petitioner had produced evidence as to where the deceased was, and that he was alive and in a position of danger for a sufficient interval of time to permit the train crew to see him and avoid coming in contact with him, her evidence would have warranted submission of the case to the jury on the issue of whether the respondent's negligence was the proximate cause of his death—but she did not do so. [Cf. *Mostyn v. Delaware L. & W. R. Co.*, 160 F. 2d 15 (C. C. A. 2nd, 1947) *Cert. den.* 332 U. S. 770 (1947), in which the plaintiff was shown to have been asleep on the track.] In *Boston & Maine R. R. v. Coppellotti*, 167 F. 2d 201 (C. C. A. 1st, 1948) the plaintiff made out a very much stronger case than was done here, in that the defendant there admitted that the deceased was struck by an engine while he was lying on the track. However the court said, pp. 203, 204:

"The laborer wanders out of sight. A regular scheduled train comes through. . . . We are told only that the decedent while lying on the track is run over. How the decedent got there and how long he had been there is left to conjecture. . . . On the basis of this meager evidence, we are asked to sustain a jury finding for the plaintiff. Yet the Supreme Court has said that the burden is on the plaintiff to present probative facts from which negligence and causal relation could reasonably be inferred; that the essential requirement is that mere speculation not be allowed to do duty for probative facts, after making allowance for all reasonable possible inferences favoring the party whose case is attacked. . . . There is no evidence to support an

inference that the decedent was on the track in the path of the locomotive a long enough time before the accident to give the engineer an opportunity to take action to avoid running over him. We are told that the fact that the decedent while lying on the track is run over at a place just before an area where a large group of men is working is enough to support a jury's finding of negligence on the part of the engineer resulting in death to the decedent. Even if it could be said that such an accident is an extraordinary occurrence which does not usually occur in the absence of negligence, there is no basis for a jury's finding that it was some act of the defendant rather than of the decedent that caused the accident. There is no evidence—either circumstantial or direct—from which negligence of the defendant can reasonably be inferred."

In the instant case there was likewise no basis for a jury's finding that it was some act of the respondent, rather than of the deceased, that caused his death, and the lower court therefore properly entered judgment for respondent.

It is also obvious that petitioner's references to the absence of a whistle signal are not helpful. They ignore completely the facts established by the petitioner herself, that no rule or regulation required the whistle to be blown (R. 108a), that the only person known to have been on or near the track before the accident crossed it in safety and was not the decedent (R. 15a, 16a, 20a, 155a), and that there was nothing to show any possible connection between lack of a whistle on a slowly moving train (R. 15a) whose bell was ringing (R. 24a, 35a) and the death of a man who was not shown by any evidence to have suffered any violence or injury whatever.

This Court has repeatedly denied certiorari, or affirmed the entry of judgment for respondent, where the petitioner failed to show negligence on the part of the respondent

which caused or contributed to the injury. *Brady v. Southern Ry. Co.*, 320 U. S. 476 (1943); *Fantini v. Reading Co.*, 147 F. 2d 543 (C. C. A. 3rd, 1945) *Cert. den.* 325 U. S. 856 (1945); *Scarborough v. Pennsylvania R. R. Co.*, 149 F. 2d 636 (C. C. A. 3rd 1945) *Cert. den.* 326 U. S. 755, *Re-hearing denied* 326 U. S. 809 (1945); *Chisholm v. Reading Co.*, 157 F. 2d 768 (C. C. A. 3rd 1946) *Cert. den.* 329 U. S. 807 (1947); *Trust Co. of Chicago v. Erie R. R. Co.*, 165 F. 2d 806 (C. C. A. 7th, 1948), *Cert. den.* 334 U. S. 845 (1948); *Eckenrode v. Pennsylvania Railroad Co.*, 335 U. S. 329 (1948); *Reynolds v. Atlantic Coast Line R. R. Co.*, 336 U. S. 207 (1949); *Scocozza v. Erie R. R.*, 171 F. 2d 745 (C. C. A. 2d, 1949) *Cert. den.* 337 U. S. 907 (1949). Certiorari should therefore be denied in this case also.

IV. Petitioner Was Not Improperly Deprived of a Jury Trial.

In her brief, petitioner apparently deliberately misinterprets the opinion of the Court of Appeals as having required the petitioner to prove the causal connection between the alleged negligence of the respondent and the injury for which suit was brought "with mathematical or absolute certainty" (Petitioner's brief p. 9). Such is clearly not the effect of the decision of the lower court which held, in accordance with the decisions of this Court, and in accordance with the basic concept of the Anglo-Saxon jury trial system, that before a proponent is entitled to have his case submitted to a jury he must first present probative facts to support the conclusion he seeks. This basic concept has been variously expressed. Thus in *Lavender v. Kurn*, 327 U. S. 645 (1946) the Court made it clear that there must be "an evidentiary basis for the jury's verdict" and "when there is a complete absence of probative facts to support the conclusion reached" it is "reversible error" to let a jury verdict stand.

In *Brady v. Southern Ry. Co.*, 320 U. S. 476 (1943) this Court said at page 479:

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co. v. Hughes, supra; Baltimore & Ohio R. Co. v. Groeger,* 266 U. S. 521, 524. Cf. *Gunning v. Cooley,* 281 U. S. 90, 94; *Commissioners v. Clark,* 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

As Professor Wigmore said in IX Wigmore on Evidence, § 2487:

"Apart from the distinction of functions between judge and jury, these rules need have had no existence. They owe their existence chiefly to the historic and unquestioned control of the judge over the jury, and to the partial and dependent position of the jury as a member of the tribunal whose functions come into play only within certain limits.

"The treatment of the situation, and the operation of the rules, can best be comprehended by keeping this consideration in mind, namely, that the *opportunity to decide finally upon the evidential material that may be offered does not fall to the jury as a matter of course;* that each party must first with his evidence pass the gauntlet of the judge; and that the judge, as a part of his function in administering the law, is to keep the jury within the bounds of reasonable action. In short, in order to get to the jury on the issue, and bring into play the other burden of proof (in the sense of the

risk of non-persuasion of the jury), both parties alike *must first satisfy the judge that they have a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict. This duty of satisfying the judge is peculiar in its operation, because if it is not fulfilled, the party in default loses, by order of the judge, and the jury is not given an opportunity to debate and form conclusions as if the issue were open to them." (Emphasis by Professor Wigmore.)

CONCLUSION.

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
HUGH B. COX,
JAMES G. JOHNSON, JR.,
HAROLD P. DICKE,
Attorneys for Respondent.

INDEX

PAGE

Petition for Re-Hearing of Original Petition for Certiorari 1

Decision and Judgment of the Court Below 2

Nature of Case and Summary Statement of Matter Involved 2

Basis of Jurisdiction 2

Questions Presented 3

Reasons Relied Upon for Allowance of Petition 4

Prayer 6

Argument in Support of Petition for Re-Hearing 6

I. The decision of the Court below is in conflict with the settled interpretation of the Federal Employers' Liability Act and, if allowed to stand, will provoke excessive litigation 6

II. Certiorari should be granted where error is not in possible misevaluation of the facts, but rather in the legal principles relied upon 13

III. The question of causal relation between the negligence and the fatal injury was one of fact exclusively for the jury 16

Conclusion 19

TABLE OF CASES CITED

PAGE

Alltmont, et al. v. U. S., et al., 177 F. 2d 971 (C. A. 3, 1949), cert den. 339 U. S. 967, 70 S. Ct. 999 (1950).. 17
Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787, 49 S. Ct. 490 (1929) 6

Bailey v. Central Vermont Ry., 319 U. S. 350, 63 S. Ct. 1062 (1943) 16
Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545 (1945) 16
Brady v. Southern Ry. Co., 320 U. S. 476, 64 S. Ct. 232 (1943) 12, 17

Cardillo v. Liberty Mutual Insurance Co., 330 U. S. 469 67 S. Ct. 801 (1947) 13
Carter v. Atlanta & St. A. B. Ry. Co., 338 U. S. 430, 70 S. Ct. 226 (1949) 8, 9, 13, 14, 15
Casey v. American Export Lines, 173 F. 2d 324 (C. A. 2, 1949) 5
Chamberlain v. Pennsylvania R. Co., 288 U. S. 333, 53 S. Ct. 391 (1933) 12, 16
Chesapeake & O. R. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495 (1926) 6
Chisholm v. Reading Co., 157 F. 2d 768 (C. A. 3, 1946), cert. den. 329 U. S. 807, 67 S. Ct. 502 (1947) 17
Coray v. So. Pac. Ry., 335 U. S. 520, 69 S. Ct. 275 (1949) .4, 14

DeBruce v. Pennsylvania R. Co., D. C. E. D. Pa., Civil Action No. 5477 (1947), 6 F. R. D. 403 (1947) 18
DeVane v. U. S. Court of Appeals for Fifth Circuit, cert. den. Mar. 5, 1951, No. 302 Misc. Dkt., U. S. Supreme Court 12

Eckenrode v. Pennsylvania R. Co., 335 U. S. 329, 69 S. Ct. 91 (1948) 9, 17

PAGE

Eglsaer v. Scandrett, 151 F. 2d 562 (C. A. 7, 1945) 5, 14
Eiseman v. Pennsylvania R. Co., 151 F. 2d 222 (C. A. 3, 1945) 5, 10

Ford Motor Co., et al. v. Ryan, 182 F. 2d 329 (1950) 12

Galloway v. U. S., 319 U. S. 372, 63 S. Ct. 1077 (1943) .. 12

Headrick v. Atchison, T. & S. F. Ry. Co., 182 F. 2d 305 (1950) 12
Hickman v. Taylor, 153 F. 2d 212 (C. A. 3, 1945), cert. den. 327 U. S. 808, 66 S. Ct. 961 (1946), vacated 328 U. S. 816, 66 S. Ct. 1337 (1946), 329 U. S. 495, 67 S. Ct. 385 (1947) 5, 18

Jamison v. Encarnacion, 218 U. S. 635, 50 S. Ct. 440 (1929) 8
Jones v. East Tenn. R. R., 128 U. S. 443 (1888) 8

Kilpatrick v. Texas & P. Ry. Co., 337 U. S. 75, 69 S. Ct. 953 (1949) 12
Kurimsky, Admx. v. Unity Rys. Co., 357 Pa. 521, 55 A. 2d 378 (1949) 5

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946) 4, 10, 12, 14, 19
Lilly v. Grand Trunk R. Co., 317 U. S. 481, 63 S. Ct. 347 (1943) 16
Lukon v. Pennsylvania R. Co., 131 F. 2d 327 (C. A. 3, 1942) 16
Lustig v. United States, 338 U. S. 74, 69 S. Ct. 1372 (1949) 12

McCarthy v. Pennsylvania R. Co., 156 F. 2d 877 (C. A. 7, 1946) 14
Moore v. Chesapeake & O. R. Co., 71 S. Ct. 428 (1951) . 12, 17
Murray v. Philadelphia Transportation Co., 359 Pa. 69, 58 A. 2d 323 (1948) 11
Myers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1334 (1947) 12

PAGE

O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 338 U. S. 384, 70 S. Ct. 200 (1949) 7, 14

O'Leary v. Brown-Pacific-Maxon, Inc., 71 S. Ct. 470 (1951) 13

Penn v. Chi. & N. W. Ry. Co., 163 F. 2d 995 (C. A. 7, 1947), 335 U. S. 849, 69 S. Ct. 79 (1948) 4, 15

Pezzulli, Admr. v. D'Ambrosia, 344 Pa. 643, 26 A. 2d 659 (1941) 11

Raudenbush v. Baltimore & O. R. Co., 160 F. 2d 363 (C. A. 3, 1947) 8

St. Louis Southwestern Ry. Co. v. Ferguson, 182 F. 2d 949 (C. A. 8, 1950) 15

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944) 4, 7, 12, 14, 16

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444 (1943) 7, 9, 10, 11, 14, 16, 19

United States v. Shaughnessy, 338 U. S. 521, 70 S. Ct. 329 (1950) 12

Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018 (1949) .. 7

Vetter v. Great A. & P. Tea Co., 322 Pa. 449, 185 A. 613 (1936) 17

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413 (1949) 7, 9, 13, 19

TABLE OF AUTHORITIES CITED

Frankfurter and Landis, The Supreme Court at October Term, 1931, 46 Harv. L. Rev. 226 (1932) 13

Holmes, The Common Law 38 (31st printing) (1938) .. 7

Richter and Forer, Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers, 36 Cornell L. Q. 203 (1951) 9, 13

TABLE OF STATUTES CITED

	PAGE
Boiler Inspection Act, Title 45 U. S. C. A. §51, et seq.	7
Federal Employers' Liability Act, Title 45 U. S. C. A. §56	2
Jones Act, 46 U. S. C. A. §688	8
Safety Appliance Acts, Title 45 U. S. C. A. §§1-23	7
Survival of Action Statute, P. L. 2755 (Pa., 1937)	11